

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

JAMES BABB, ET AL.

RESPONDENTS,

v.

**MISSOURI PUBLIC SERVICE
COMMISSION, ET AL.**

RESPONDENT,

**CITY OF CLARKSON VALLEY,
MISSOURI, SCOTT DOUGLASS,
JAMES MEYER, LYN MIDYETT,
HONORA SCHILLER, SUSAN SHEA,
SCOTT SCHULTZ, AND WENDELL
SITTSER,**

APPELLANTS.

DOCKET NUMBER WD76384
DATE: November 26, 2013

Appeal From:
Cole County Circuit Court
The Honorable Daniel R. Green, Judge

Appellate Judges:
Division Three: Karen King Mitchell, Presiding Judge, Lisa White Hardwick, Judge and
Gary D. Witt, Judge

Attorneys:
Shelley E. Brueggemann and Joshua Harden, Jefferson City, MO for respondent Missouri Public
Service Commission.
Stephen G. Jeffery, Chesterfield, MO, for respondents Babb, et al..
John F. Mulligan, Jr., Clayton, MO for appellants.

MISSOURI APPELLATE COURT OPINION SUMMARY

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Cole County

Before Division Three: Karen King Mitchell, Presiding Judge, Lisa White Hardwick, Judge and Gary D. Witt, Judge

The Board of Aldermen for Clarkson Valley, Missouri, denied the application of James and Frances Babb for a Special Use Permit ("SUP") to install a solar energy system on their home, basing its denial on a city ordinance. The Babbs, along with the Missouri Solar Energy Industries Association, filed suit alleging *inter alia* that the City's ordinance was preempted by the State's permissive regulations on renewable energy, specifically the "Electric Utility Renewable Energy Standard Requirements," 4 CSR 240-20.100. The Babbs also alleged that their application for a SUP had been arbitrarily and capriciously denied. The trial court granted partial summary judgment to both petitioners, based upon a finding that the City's ordinance regulating the grant of an SUP to the Babbs was preempted by the State's statutes and regulations and therefore void. The trial court also granted partial summary judgment to the Babbs finding that the City's denial of the SUP was in fact arbitrary and capricious. Without waiting until the judgment became final, the Babbs constructed the system. The City appealed once the judgment became final.

On appeal, the City argues that the trial court erred in granting summary judgment because (1) the City's building ordinances do not actually conflict with the State's statutes and regulations; (2) the Babbs' petition failed to state a claim upon which relief can be granted; (3) the Babbs' petition was filed more than thirty days after the administrative decision of the Board, which is prohibited by section 89.110; (4) MOSEIA's petition failed to state a claim upon which relief can be granted; and, alternatively argues (5) that the court erred in entering its final judgment on the original petition and not on the Babbs' first amended petition.

AFFIRMED

Division Three Holds:

(1) The trial court erred in granting summary judgment based on preemption because there was insufficient evidence that the City's building ordinances actually conflicted with the State's statutes and regulations, however, its finding that the Board's denial was arbitrary and capricious was not appealed so the judgment is affirmed on that ground.

(2) The trial court did not err in applying section 536.150 as the governing statute to its review of the City's decision to deny the permit because review of a Board of Aldermen's decision falls outside of chapter 89, which only applies expressly to decisions made by Boards of Adjustment.

(3) The trial court did not err in entering its final judgment on the original petition because the first amended petition specifically incorporated and referenced the claims ruled on by the trial court's earlier grant of partial summary judgment, preserving all claims in the final judgment.

(4) The trial court had subject matter jurisdiction and authority to review whether a city ordinance conflicted with state law because the state law was not being questioned; thus, review by the Public Service Commission was not first required to give the trial court subject matter jurisdiction.

Opinion by Gary D. Witt, Judge

November 26, 2013

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